Olean General Hospital *and* New York State Nurses Association. Cases 03–CA–097918, 03–CA–104444, and 03–CA–104462

December 11, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

On September 24, 2013, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union each filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.[1]

For the reasons set forth below, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act when it failed and refused to bargain in good faith with the Union both over the decision to implement a training program that employed unit nurses as trainers of nursing students and over the effects of that decision. We also agree that the Respondent unlawfully failed and refused to supply the Union with relevant information about the training program and about a patient care survey conducted by an outside agency.

I. THE DEDICATED EDUCATION UNIT PROGRAM

A. Facts

The New York State Nurses Association (Union) has represented nurses at Olean General Hospital (Hospital or Respondent), Olean, New York, since about 1996. The Union and the Respondent were parties to a collective-bargaining agreement effective from February 1, 2010 through January 31, 2013, and then extended to May 1, 2013.

At the end of a grievance meeting in late November 2012, Union Representative Karen Wida learned from the Respondent's vice president of human resources, Timothy McNamara, and another manager that the Respondent intended to create a new program for clinical training of student nurses enrolled in SUNY's College of Technology at Alfred, New York (Alfred). That program, known as the Dedicated Education Unit (DEU) program, would use the Respondent's unit nurses as trainers. Wida expressed support for the program, asked for further information, and said that she expected that they would discuss the program soon.

About December 2, 2012, Wida learned from a unit nurse that the nurse had been chosen to be a clinical instructor in the DEU program. The nurse gave Wida a packet of information she had received about the program. The packet included a November 26, 2012 letter from Alfred that described the DEU program as a pilot project and as the "first rural model DEU" in New York State. It explained that nurses would have to apply for the program, undergo an interview with Alfred and the Respondent, and if selected, sign a contract and attend an orientation program given by Alfred faculty. Those nurses selected would represent Alfred and the DEU and would be employees of both the Respondent and Alfred. The packet included an application form and a contract.

By email of December 4, 2012, Wida told McNamara and the Respondent's vice president for patient care services, Jeffrey Zewe, that the Respondent could not deal directly with unit employees, noting that she was aware that the Respondent had already selected four nurses for the program and had met with them. She also requested bargaining over the DEU program. McNamara replied that they "should talk" because he did not understand what needed to be negotiated in light of the language in the collective-bargaining agreement authorizing the Hospital to select preceptors. Wida responded to McNamara's email, expressing the view that the DEU program differed from other training programs in that it made unit nurses adjuncts at Alfred, with Alfred paying the nurses for their work. Wida also expressed concerns about selection criteria, pay, and liability issues for nurses. Zewe also replied to Wida's initial email, stating that he had already selected four nurses to participate in the program and expressing the view that the collective-bargaining agreement authorized the program. However, he also requested that his secretary set up a meeting with Wida, McNamara, and others to discuss the program. That meeting never occurred.

By a January 2, 2013 email, Wida sent the Respondent a numbered list of questions about the program, including the following:

> 2. The problem becomes if the nurse is working for both [the Respondent and Alfred] at the same time,

[1] We shall modify the judge's conclusions of law to conform to our findings. We shall also modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified, and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

> who do they take orders from, the hospital or the college? This puts the nurse in a lose/lose situation. They have to protect their license.
>
> 7. What type of education is being provided to these selected nurses to provide the education/clinical experience the college is looking for as well as the curriculum and weekly expectations of the students?

Although Zewe orally explained the basics of the program to Wida, the Respondent never responded to questions 2 and 7.

The Respondent chose seven unit nurses for the DEU program, which ran from January to May 2013. In addition to the requirements described in the November 26, 2012 letter sent to candidates for the program, the Respondent required that the nurses monitor the Alfred students for 36 hours over 2-week periods, for which the nurses received $1000 from Alfred in addition to their regular pay from the Respondent.

In recent years, the Respondent has had agreements with area educational institutions that enabled students to obtain clinical experience. The Respondent did not bargain with the Union about those agreements. Unlike the DEU program, however, those other programs provided for college instructors to oversee their students' training, and they did not require the Respondent's unit nurses to sign contracts with the colleges or attend college-run training. In addition, those programs did not provide that the colleges would pay the participating unit nurses for overseeing the trainees.

B. The Judge's Decision

The judge found that the Respondent violated Section 8(a)(5) and (1) by failing to bargain with the Union over the decision to implement the DEU program and its effects. He rejected the Respondent's contentions that it had the right under the collective-bargaining agreement to implement the DEU program and that the program was consistent with past agreements the Respondent maintained with other educational institutions. The judge also found that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with the information it had requested on January 2, 2013. The Respondent excepts to all of those findings. For the reasons set forth below, we find no merit in the exceptions.

C. Discussion

1. *Decision bargaining.* The Respondent contends that it had no duty to bargain over the decision to implement the DEU program. Citing Justice Stewart's concurrence in *Fibreboard Paper Prods. v. NLRB,* 379 U.S. 203, 223 (1964), it argues that its decision to enter into the DEU program was a managerial decision "at the core of entrepreneurial control." We disagree (as does our colleague, Member Miscimarra). Justice Stewart offered as examples of managerial decisions "at the core of entrepreneurial control" an employer's decision to adopt labor-saving machinery or to liquidate its assets and go out of business. Id. In contrast, the decision to use unit nurses to provide clinical training for student nurses for a few months, which affected the unit nurses' duties and compensation, is "almost exclusively 'an aspect of the relationship' between employer and employee," and hence a mandatory subject of bargaining. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981) (internal citation omitted). In no event can it be characterized as a "change in the scope and direction of the [Respondent's] enterprise, [] akin to the decision whether to be in business at all[.]" Id. The General Counsel persuasively argues that the decision to implement the program significantly affects the unit employees' employment. The DEU program has a direct impact on working conditions, including pay, of unit employees, and is amenable to the bargaining process. Accordingly, we find that the DEU program is a mandatory subject of bargaining and that the Respondent was required to bargain over the decision to implement it. Id. at 678–679.

The Respondent also asserts that it was not required to bargain over the decision to implement the DEU program because its conduct was "clearly encompassed" by the management-rights clause and "covered" by Section 10.13 of the collective-bargaining agreement. We reject that argument, in contrast to our colleague.

The management-rights clause states in relevant part:

> The Respondent retains the sole right to manage its business and direct the working force, including the right to decide . . . the nature and extent of services provided, . . . to assign and delegate work; . . . to determine staffing patterns. . . .

Section 10.13 reads:

> An employee who is assigned the responsibilities of preceptor of a graduate nurse, registered nurse or student nurse intern shall be paid a differential of one dollar ($1) per hour while working in said assignment. To be assigned preceptor, an employee must successfully complete the in-service program for preceptors.

In evaluating an employer's claim that the collective-bargaining agreement permits it to make unilateral changes in terms and conditions of employment, the Board applies the long-established "clear and unmistakable waiver" standard. *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). That standard "requires

bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." Id. See also *King Soopers*, 340 NLRB 628, 635 (2003), citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The party asserting the waiver bears the burden of establishing its existence. See, e.g., *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), enfd. mem. 112 Fed.Appx. 65 (D.C. Cir. 2004). Here, we find that the Respondent failed to show that the parties unequivocally and specifically expressed their mutual intention to permit the Respondent to establish the DEU program unilaterally. *Provena*, supra, 350 NLRB at 811.

The general provisions of the management-rights clause—which address determining services, assigning work, and setting staffing patterns—do not clearly and unmistakably refer to the establishment of a program like the DEU program, which involved not merely determining that the Respondent would provide training to student nurses and assigning that work to selected nurses, but also requiring those nurses to enter into a contractual employment relationship with another employer and to attend training provided by that employer, as well as fixing the compensation the employer would pay. Nor is there any bargaining history to support a finding that the management-rights clause was mutually intended by the parties to encompass something like the DEU program. See *Johnson-Bateman,* 295 NLRB 180, 185 (1989) ("Waiver of a statutory right may be evidenced by bargaining history, but the Board requires the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter."). It is not surprising then, that Union Representative Wida anticipated that the Respondent would bargain with the Union when she learned of its desire to establish the DEU program.

Nor do the terms of Section 10.13 establish that the Union clearly and unmistakably waived its right to bargain over the DEU program. That section does not refer to a program like the DEU program either, but merely states that the Respondent may assign nurses to act as preceptors for students and pay them a differential of $1 per hour. There is no suggestion in Section 10.13 that the Respondent was entitled to compel unit nurses to enter into a contractual employment relationship with another employer, to require nurses to attend training by the other employer, and to determine what compensation nurses would receive from that employer. Here, too, there is no evidence of bargaining history to support a finding that Section 10.13 was mutually intended by the parties to allow the unilateral implementation of this type of program. Thus, the Respondent has failed to show that the Union, by agreeing to the above contractual terms, waived its right to bargain over the Respondent's decision to implement the DEU.[2]

We also reject the Respondent's contention that implementation of the DEU program was consistent with past practice in which the Union did not object to the implementation of programs under which bargaining unit employees provided certain training to student nurse interns. The judge found, and we agree, that the DEU program is "sufficiently distinguishable" from the training programs implemented in the past such that notice and an opportunity to bargain over the DEU program was required. The Respondent claims that the differences between the earlier programs and the DEU program were not "material." We disagree. Unlike the DEU program, none of the other programs required unit nurses to apply for positions, to sign employment contracts with the participating college, or to attend training conducted by the college. In addition, none of the prior programs included payment to the unit nurses from the schools, and all provided for college instructors to be part of the training of student nurses at the Respondent's site.[3]

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[2] In light of *Provena*, supra, in which the Board reaffirmed its adherence to the "clear and unmistakable waiver" standard, we necessarily reject the Respondent's contention that the "contract coverage" standard of *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993), applies. But even under the "contract coverage" standard, we would find that the cited contract provisions do not privilege the Respondent's unilateral implementation of the DEU program: by their terms, they do not "cover" that program, which encompassed terms and conditions of employment entirely separate from the subjects addressed by the management-rights clause and Sec. 10.13 of the collective-bargaining agreement.

[3] The Respondent argues that the judge erroneously found that other training programs "included oversight by an on-site instructor from the institution." In support, the Respondent cites the testimony of Hospital Vice President McNamara that under previous training arrangements with colleges, the colleges' instructors were normally the lead trainers, but that on occasional evening, night, or weekend shifts, students worked under unit nurses instead of college instructors. McNamara, however, was unable to recall any specific instances when a unit nurse served as a preceptor, and Union Representative Wida testified that college instructors were present at the Hospital when students participated in clinical programs.

The Respondent also contends that a 2006 agreement between the Respondent and a local college, Jamestown Community College, shows that there is a history of direct teaching by unit nurses. Although the 2006 agreement provided that unit nurses would supply teaching and supervision, the agreement required the college to "assume full responsibility for planning and executing the education program," and to "provide instructors . . . for teaching and supervision of students assigned to" the Respondent. A 2011 agreement between those same parties specified that, except in emergency care situations, the college

For those reasons, we agree with the judge that the unilaterally implemented DEU program was not consistent with the Respondent's earlier unilaterally implemented student nurse training programs, and therefore that the Respondent was required to give notice and an opportunity to bargain before implementation.[4] See *Caterpillar, Inc.*, 355 NLRB 521, 523 (2010). Moreover, even if the DEU program was substantially similar to the earlier training programs, the Board has repeatedly held that a "union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time." Id. at 523, quoting *Owens-Corning Fiberglas*, 282 NLRB 609 (1987). See also *Provena*, supra, 350 NLRB at 815 fn. 35.[5]

Dissenting from our view, Member Miscimarra would find a clear and unmistakable waiver here (but without endorsing that long-established standard). We are not persuaded by his arguments. First, he reads the general contract language here as if it specifically addressed the constituent elements of the DEU program itself—which it simply does not.[6] Second, he treats those constituent elements—including the requirement of an employment relationship with Alfred and the compensation provided by Alfred—as if they were merely consequences that followed from the Respondent's decision to establish the program. In his view, the "central feature" of the DEU program was the "assignment of preceptor responsibilities to [the] unit nurses"—which the Respondent was free to do unilaterally—and all other terms and conditions of employment unilaterally determined by the Respondent were "ancillary aspects of the arrangement." Thus, Member Miscimarra would not order the Respondent to rescind the DEU program. Instead, he would require only effects bargaining over the program's "ancillary aspects," while the program (presumably in its entirety) remained in place, coupled with some unspecified version of the limited make-whole remedy that the Board grants when, for example, employees are laid off as the consequence of a non-bargainable decision to close a facility. See *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

We reject our colleague's view that the constituent elements of the DEU program can or should be treated as mere consequences of the program, such as the effect of the program on nurses' schedules, supervision, state licensing requirements, or performance evaluations. The decision to establish the DEU program was not simply the exercise of a contractual right to assign work to unit nurses—it was obviously more, inasmuch as the DEU program required unit nurses to enter into contractual employment relationships with Alfred and provided for Alfred to train and compensate the nurses. These elements of the DEU program took it outside the scope of the Respondent's management rights under the collective-bargaining agreement. By categorizing important elements of the DEU program as effects, our colleague would issue a remedy that the Board has recognized as only an imperfect substitute for timely compliance with the duty to bargain.[7] We see no good reason in precedent or in policy to follow an approach that leads to such a result here.[8]

2. *Effects bargaining.* The Respondent excepts to the judge's conclusion that the Respondent unlawfully failed to bargain over the effects of the implementation of the

was to retain "responsibility for its Student's educational requirements and assignments through its Faculty at the Hospital."

Based on the above, we find that the record as a whole supports the judge's finding that student interns in past training programs were supervised by the college's instructors. But even if those instructors were not present at the Respondent's workplace on occasion, there were other material differences, discussed above, between the DEU program and the prior programs, and we would affirm the judge's finding based on those other factors.

[4] Indeed, even the packet the Respondent sent to prospective nurse trainers described the DEU program as "innovative" and the "first rural model."

[5] The Respondent also argues that it has no duty to bargain over pay that employees receive from a third party (Alfred). That argument—endorsed and extended by our colleague—ignores the relevant circumstances here. It was the Respondent's unilateral implementation of the DEU program which determined that selected nurses would have an employment relationship with Alfred and what their compensation from Alfred would be. These are terms and conditions of the nurses' employment with the Respondent, imposed on them unilaterally by the Respondent, in violation of the duty to bargain.

[6] This case is easily distinguishable from *Chemical Solvents*, 362 NLRB No. 164 (2015), which our colleague cites. There, applying the waiver standard, the Board held the contractual language permitting the employer "[t]o transfer any or all of its . . . work . . . to any other entity" privileged its decision to subcontract work." Id., slip op. at 6. The Board observed that although the language did not "refer to subcontracting by name," it necessarily included subcontracting, which "cannot be accomplished without transferring work to another entity." Id. Here, determining services, assigning work, and setting staffing patterns—management rights referred to in the contract—can all be accomplished without requiring unit employees to enter into a contractual employment relationship with a third party and receive training and without fixing the compensation to be paid by that party.

[7] In *Transmarine*, supra, the Board recognized that after the facility was closed, it was "impossible to reestablish a situation equivalent to that which would have prevailed had the [employer] more timely fulfilled its statutory bargaining obligation." 170 NLRB at 389. An order to bargain over effects was inadequate by itself, the Board explained, because bargaining would predictably be "*pro forma.*" Id. at 390. Thus, the Board also issued a limited backpay remedy "to recreate in some practicable manner a situation in which the parties' bargaining position [was] not entirely devoid of economic consequences for the [employer]." Id.

[8] As the *Provena* Board explained, the waiver standard "reflects the Board's policy choice, grounded in the Act, in favor of collective bargaining concerning changes in working conditions that might precipitate labor disputes." 350 NLRB at 811.

DEU training program.[9] The Respondent argues that it was not required to bargain over effects because the contract authorizes the implementation of the DEU program and it acted in accordance with past practice. That argument fails for the reasons stated above with respect to decision bargaining.

The Respondent also argues that it offered to bargain over effects. We find no merit to that contention. The record clearly shows that the Respondent did not offer to *bargain* with the Union about the DEU program and its effects, but only suggested to the Union, much later, that it might provide information to settle the unfair labor practice dispute. And it is undisputed that the Respondent never bargained with the Union over the effects of implementing the DEU program. Accordingly, we find that the Respondent unlawfully failed to bargain over the effects of its decision to implement that program.

3. *The DEU information request*. The judge concluded that the Respondent violated Section 8(a)(5) and (1) by failing to give the Union the information about the DEU program that it requested in paragraphs 2 and 7 of its January 2, 2013 email. The judge, however, did not include any rationale for that finding. For the following reasons, we find that the Respondent's failure to provide that information violated Section 8(a)(5) and (1) as alleged.

Information regarding unit employees' terms and conditions of employment is presumptively relevant. See *Disneyland Park*, 350 NLRB 1256, 1257 (2007). Information concerning a training program that affects employees' terms and conditions of employment is thus relevant to the Union's representational role. The specific information requested—who the participating nurses would take orders from, and what education the nurses would receive to enable them to participate—is, therefore, plainly relevant to the Union.

The Respondent does not dispute any of these principles. Instead, it repeats its argument (rejected above) that it had no duty to respond to the information requests because it had already satisfied its bargaining obligation when it negotiated its collective-bargaining agreement with the Union. In the alternative, the Respondent contends that it satisfied any duty to provide information about the program because (1) it asserted its willingness to meet with the Union to discuss the DEU program and to provide information, (2) it actually provided certain information, and (3) in any event the Union received the information from a bargaining unit nurse. We find no merit in any of these arguments.

The information the Union requested on January 2, 2013, that the Respondent failed to supply (pars. 2 and 7) was not included in the information that was orally furnished to Union Representative Wida or in the packet of information Wida received from a unit nurse.[10] And although the Respondent's attorney indicated to Wida that the requested information might be forthcoming, it was in fact never furnished. Moreover, the Respondent did not even suggest that it would provide information until May 2013, some 4 months after the Union's information request and 3 months after the initial unfair labor practice charge had been filed, and again in August 2013, about a week before the hearing opened. The Respondent offers no explanation for such an extended delay in answering a straightforward request, for what appears to be a small amount of readily available information. Such a delay in responding to a request for information is unlawful in itself. See *American Signature, Inc.*, 334 NLRB 880, 885 (2001); *Detroit Newspaper Agency*, supra, 317 NLRB at 1072.

II. REQUEST TO PROVIDE PATIENT-CARE SURVEY

A. Facts

On March 1, 2013, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) performed a survey of the Respondent's patient care.[11] The JCAHO orally informed the Respondent of its preliminary findings immediately after completing the survey, and in late March, the Respondent received a final written report. The report listed 40-some patient care deficiencies.

By letter dated March 4, Union Representative Dennis Zgoda, who was engaged in bargaining with the Respondent for a new collective-bargaining agreement, requested a copy of the JCAHO report and the list of deficiencies after learning of its existence from unit nurses. Staffing was an issue in bargaining, and the Union wanted to know if staffing had been implicated in the report.

On March 6, the Respondent's president and CEO, in a memo to the Respondent's departments of surgery and anesthesiology and the surgical nursing staff, discussed the deficiencies, which included failures to identify pa-

[9] The judge's recommended Order includes a remedy for the failure to bargain over the effects of implementing the DEU program. The judge did not, however, include any rationale for finding an effects bargaining violation, nor did he include an effects bargaining violation in his conclusions of law.

[10] In any event, the possible availability of information to the Union from an alternate source does not excuse the Respondent from its obligation to furnish such information. See *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995).

[11] JCAHO surveys are voluntary, but if a hospital chooses not to participate, the hospital is required to undergo a mandatory annual survey by the Centers of Medicare and Medicaid. JCAHO surveys are conducted every 3 years.

tients before procedures, to assess patients before sedation, to update documentation before procedures, and to document postprocedure patient evaluation and assessment. The memo stated that the deficiencies were basic to patient safety and that there would be zero tolerance for failure to make corrections.

On March 8, Respondent Vice President McNamara informed Zgoda that the Union's March 4 request for information had been referred to the Respondent's attorneys. The Union received no further response. On April 1, Zgoda resubmitted the Union's March 4 request to McNamara, but the Respondent gave no response.

B. The Judge's Decision

Although the JCAHO report is not in evidence, the judge found that the information contained in the report was potentially relevant to the Union in its capacity as the unit's bargaining representative because staffing was a major issue in negotiations and the deficiencies identified in the report may have been staffing-related. The Respondent has not specifically excepted to this finding.[12] The judge also found that the Respondent was not justified in failing to produce the report on confidentiality grounds. We agree with the judge that the Respondent is required to produce the requested information, but only for the reasons discussed below.[13]

C. Discussion

The Respondent asserts that the information in the survey is protected from disclosure under New York law. The Respondent relies in particular on New York Education Law §6527(3), which reads:

> Neither the proceedings nor the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program nor any report required by the department of health . . . shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided or as provided by any other provision of law.

The judge found that this provision did not apply because the Union was not seeking the information under State civil practice law, and that even assuming it applied, Section 6527(3) by its terms lifts the prohibition on disclosure when any other provision of law, for example, Section 8(a)(5) of the Act, is applicable. We disagree with the judge's finding that Section 6527(3) is irrelevant.

When balancing a claim of confidentiality against a union's need for information under *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318–319 (1979), the Board has considered State laws defining certain information as confidential. In *Kaleida Health, Inc.*, 356 NLRB No. 171, slip op. at 1, 6–7 (2011), the Board affirmed an administrative law judge's finding that New York State's general policy against disclosure of the kinds of information covered by Section 6527(3) raised a legitimate confidentiality interest with regard to certain incident reports requested by the union in that case. The Board found that although hospital incident reports were relevant to the union's need to assess the merits of a grievance, Section 6527(3) and another State law provision established a legitimate confidentiality interest on the part of the employer. 356 NLRB No. 171, slip op. at 7. See also *Borgess Medical Center*, 342 NLRB 1105, 1105 (2004) ("state law deeming certain information confidential may be considered in assessing whether there is a legitimate confidentiality interest in that information"); *GTE California, Inc.*, 324 NLRB 424, 426–427 (1997) (confidentiality interest shown both by employer's treatment of the information and by nature of information itself, which was deemed confidential under state statute). Moreover, as the Respondent states, New York state courts have construed Section 6527(3) to exempt the JCAHO report and deficiency list from state court civil discovery. See *Zion v. New York Hospital*, 183 A.D. 2d 386, 389 (1st Dept. 1992) (construing §6527(3) to exempt from discovery the records in JCAHO investigative file, to further the public policy of encouraging "open and candid discussion of hospital conditions"). Consistent with these authorities, we find, contrary to the judge, that the Respondent has established a legitimate and substantial confidentiality interest in the survey and its contents.

But that does not end the matter. If an employer has a legitimate and substantial confidentiality interest, it must notify the union in a timely manner and seek to accommodate the union's request and the confidentiality concern. See *A-1 Door & Building Solutions,* 356 NLRB No. 76, slip op. at 3 (2011); *Detroit Newspaper Agency*, supra, 317 NLRB at 1072. Here, the Respondent unlawfully failed to take either step. See *Bundy Corp.*, 292 NLRB 671, 672 (1989) (unlawful for employer to ignore union's information request for 2-1/2 months); *Borgess Medical Center*, supra, 342 NLRB at 1106 (employer

[12] Although the Respondent did not specifically except to the judge's finding that the requested information was potentially relevant, it does argue in its supporting brief that the report was "not relevant to the pending contract negotiations or any other matters concerning the Union" and that the Union provided "no legitimate or compelling reason" for requesting the report.

The General Counsel did not except to the judge's finding that the information is potentially relevant, rather than presumptively relevant.

[13] As discussed below, however, we will place certain restrictions on the disclosure of the JCAHO survey.

unlawfully failed to offer a reasonable accommodation for the union's request). Indeed, the Respondent did not even raise any confidentiality concerns until it filed its answer to the unfair labor practice complaint.

Moreover, although the Respondent has raised a legitimate confidentiality interest, that interest must be balanced against the Union's need for the information contained in the survey. *Detroit Edison v. NLRB*, supra, 440 U.S. at 318–319. As the judge in *Kaleida* observed, the protection from disclosure afforded such documents under New York state law is not absolute: Section 6527(3) expressly allows for disclosure "as provided by any other provision of law." State law thus clearly contemplates that documents such as the JCAHO report are subject to disclosure under other statutory regimes, such as the National Labor Relations Act. 356 NLRB No. 171, slip op. at 7.

Turning to the balancing of interests in the present case, we find, as in *Kaleida*, that the Union's need for the information in the survey, to assist it in negotiations and possibly in representing the unit in disciplinary matters, outweighs the Respondent's interest based on the state's confidentiality policy aimed at state court civil discovery. As the judge found, the information in the report is potentially relevant to the Union's ability to fulfill its duties as the employees' bargaining representative, which include negotiating and administering a contract. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956); *A-1 Door & Building Solutions,* supra, 356 NLRB No. 76, slip op. at 2. The information the Union sought here—the report and list of deficiencies—was relevant, particularly as staffing questions were a major issue in the parties' contract negotiations, the deficiencies noted were potentially related to staffing questions, and the information would have assisted the Union in evaluating or responding to any proposals on staffing the Respondent might offer or in formulating proposals of its own. In addition, the Respondent's March 6 memo about the report and list of deficiencies raised concerns about discipline because it warned of zero tolerance for failures to correct deficiencies. Thus, the memo, which issued between the Union's first and second requests for information, made the report even more potentially relevant to the Union's representational duties.[14]

The Respondent nevertheless argues that the Union, unlike the union in *Kaleida*, failed to demonstrate a "specific need" for the requested information. The union in *Kaleida* was processing the grievance of a nurse who had been discharged for the manner in which she handled the fall of a patient. In that case, the union asked for reports of previous similar incidents to determine whether the grievant was the victim of disparate treatment. 356 NLRB No. 171, slip op. at 7. The Respondent claims that here, by contrast, Zgoda was unable to identify any specific information in the JCAHO survey that might have assisted the Union in negotiations, and therefore the Union's request for the report in this case was simply a "fishing" expedition. In this connection, the Respondent points out that although Zgoda attempted to claim that the report was relevant to current contract negotiations concerning staffing, he admitted that he had no knowledge that such information was in the report. The Respondent also claims that Diane Haughney, the Respondent's director of clinical and regulatory systems, "confirmed that the report does not address staffing."

We do not find Zgoda's inability to identify specific relevant information in the survey to be significant in the circumstances of this case. The inability to identify specific relevant information in the report can hardly be held against the Union, which has never seen the report. By contrast, the Respondent has seen the report and knows what is in it; accordingly, it had ample opportunity to show that the information contained in the report would be of no benefit to the Union, if that is in fact the case.[15] Yet at the time the request was made, the Respondent did not oppose the Union's information request on relevance grounds but it simply ignored the request. We therefore reject the Respondent's contention that the Union's supposed inability to show a "specific need" for the survey undercuts the Union's claim that the survey was relevant and necessary to its ability to effectively represent the employees.[16]

On the other side of the balance, there is the state's general policy against disclosure, which expressly contemplates that covered documents, such as the JCAHO survey, nonetheless may have to be disclosed under other

[14] Although the Union's request did not set forth its particular reasons for seeking the information in its request, the Respondent did not question its relevance at the time the request was made. In any event, the relevance of the request would have been, from all the circumstances, plain to the Respondent. The parties were bargaining for a new contract during which the issue of staffing had arisen, and the Respondent's memo indicated the possibility of discipline as a result of the report.

[15] The Respondent's claim that Haughney "confirmed that the report does not address staffing" is not supported by the record. Haughney testified only that, to her knowledge, the Joint Commission did not have staffing ratios or standards.

[16] The judge noted that the parties were engaged in negotiations at the time of the hearing in August 2013. They may have successfully completed those negotiations. But even if they have, that would not obviate the Union's need for the requested information. The duty to bargain does not cease when negotiations have been completed, and staffing issues and disciplinary concerns may arise during the term of a collective-bargaining agreement.

statutory requirements. Although the Respondent does have a general confidentiality interest in this type of document, as the Board recognized in *Kaleida*, we find, in these circumstances, that the Respondent's confidentiality interest is outweighed by the Union's clear need for the requested information for bargaining purposes, and in possible disciplinary situations.[17]

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been the exclusive collective-bargaining representative of the following bargaining unit of the Respondent's employees:

> All full-time, regular part-time, and per diem staff and temporary Registered Nurses and Graduate Nurses employed by the Olean General Hospital, including Utilization Review Coordinators, Infection Control Nurses, Cardiac Care and Cardiac Rehabilitation Nurses, QA Nurses, RN Educators, RN Instructors, Employee Health Nurses, and Charge Nurses; excluding Discharge Planners, Clinical Care Coordinators, Nurse Managers, Assistant Nurse Mangers, Shift Managers, Licensed Practical Nurses, Nursing Assistants, any other professional employees, technical employees, service and maintenance employees, clerical employees, guards and supervisors as defined in the Act.

4. By the following conduct, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act:

(a) Failing to timely notify the Union and afford it an opportunity to bargain over the decision to implement the DEU program.

(b) Failing to timely notify the Union and afford it an opportunity to bargain over the effects of the decision to implement the DEU program.

(c) Refusing to bargain with the Union by failing and refusing to furnish it with requested information about the DEU program.

(d) Refusing to bargain with the Union by failing and refusing to furnish it with the JCAHO survey and list of deficiencies.

5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

[17] Our colleague joins in our rationale for finding this violation.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify and give the Union and opportunity to bargain over the decision and the effects of the decision to implement the DEU program, we shall order it to, on request of the Union, rescind the unilaterally implemented DEU program, and notify, and on request, bargain with the Union over that program and any changes in unit employees' terms and conditions of employment.

In addition, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with the information requested about the DEU program, we shall order the Respondent to furnish the Union with that information.

Further, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with the requested JCAHO survey and list of deficiencies, we shall order the Respondent to furnish the Union with that information, with any patient identifiers redacted. This remedy is consistent with the Board's remedy in *Kaleida*, supra. In *Kaleida*, the Board found that the union's need for the requested information in order to process a pending grievance outweighed the employer's asserted confidentiality concerns. Noting that the employer had failed to offer a reasonable accommodation of its interests and the union's need for the requested information, the Board rejected the employer's contention that the appropriate remedy was an order to bargain with the union over an accommodation. Instead, the Board ordered the employer to provide the requested information with patient names redacted. The Board also ordered the parties to withhold the records from anyone not central to the grievance process. 356 NLRB No. 171, slip op. at 1, 9.[18]

We find that a similar remedial approach is appropriate in the present case. The Respondent established a legitimate and substantial confidentiality interest by virtue of

[18] The Board has devised similar remedies on numerous other occasions. See, e.g., *Pennsylvania Power Co*, 301 NLRB 1104, 1106–1108 (1991) (ordering release of summaries of witness statements with particular personal identifying information redacted); *Washington Gas Light Co.*, 273 NLRB 116, 117 (1984) (ordering release of disciplinary records to extent such records did not include medical information); *LaGuardia Hospital*, 260 NLRB 1455, 1455, 1464 (1982) (ordering release of portions of patient chart information); *Fawcett Printing Corp.*, 201 NLRB 964, 964 fn. 2, 976 (1973) (ordering release of requested commercial information with some confidential provisions redacted and limiting access to union's agents).

applicable State law, but the balance of competing interests nonetheless warrants disclosure of the JCAHO survey and list of deficiencies. In addition, it was the Respondent's burden to timely seek an accommodation of its confidentiality concerns. This it failed to do; indeed, the Respondent never raised a timely confidentiality claim and never sought an accommodation. In those circumstances, we will not order the Respondent to bargain about an accommodation, but will instead order the Respondent to supply the JCAHO survey and list of deficiencies, with all patient identifiers redacted. *Kaleida*, 356 NLRB No. 171, slip op. at 1, 9.[19] However, the requirement to redact patient identifiers will not have a preclusive effect if the Union later demonstrates a particularized need for any of the redacted information. In addition, as in *Kaleida*, we shall limit access to the JCAHO information to those persons who are involved in or necessary to the Union's representational functions.

ORDER

The National Labor Relations Board orders that the Respondent, Olean General Hospital, Olean, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its bargaining unit employees without first notifying the Union, New York State Nurses Association, and giving it an opportunity to bargain over the decision and its effects.

(b) Failing and refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) At the Union's request, rescind the changes in the terms and conditions of employment for its unit employees that the Respondent unilaterally implemented beginning about November 2012, including the DEU program.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify, and on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time, regular part-time, and per diem staff and temporary Registered Nurses and Graduate Nurses employed by the Olean General Hospital, including Utilization Review Coordinators, Infection Control Nurses, Cardiac Care and Cardiac Rehabilitation Nurses, QA Nurses, RN Educators, RN Instructors, Employee Health Nurses, and Charge Nurses; excluding Discharge Planners, Clinical Care Coordinators, Nurse Managers, Assistant Nurse Mangers, Shift Managers, Licensed Practical Nurses, Nursing Assistants, any other professional employees, technical employees, service and maintenance employees, clerical employees, guards and supervisors as defined in the Act.

(c) Upon request, bargain with the Union over the implementation and effects of the implementation of the DEU training program.

(d) Furnish to the Union in a timely manner the information it requested on January 2, 2013 about the DEU training program, set forth in paragraphs 2 and 7 of its request.

(e) Furnish to the Union in a timely manner the information it requested on March 4, and April 1, 2013, including the survey results and list of deficiencies issued by the Joint Commission on Accreditation of Healthcare Organizations in 2013, with any patient identifying information redacted. The redaction of patient identifiers will not have a preclusive effect if the Union later demonstrates a particularized need for any of the redacted information. Upon receipt of the information, the Union, its officers, agents, members, and attorneys, shall not divulge the information to any other persons who are not involved in or necessary to the Union's representational functions.

(f) Within 14 days after service by the Region, post at its Olean, New York facility copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices,

[19] In exceptions, the Respondent argues only that it did not violate the Act by failing to furnish the requested information; it does not argue that the appropriate remedy for any such violation would be an order to bargain over an accommodation. For the reasons stated above, we disagree with our colleague's view that we should permit such bargaining now in the context of a compliance proceeding.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 2012.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 11, 2015

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In 2012, Respondent Olean General Hospital ("Respondent" or "Olean"), partnering with the State University of New York's College of Technology at Alfred, New York ("Alfred"), created the Dedicated Education Unit or "DEU" program to train student nurses enrolled at Alfred. The issues presented by this case are whether the Respondent was obligated to bargain over its *decision* to create the DEU program, the *effects* of that decision, or both. The Respondent argues that the Union waived its right to bargain over the DEU program in its entirety. The majority finds that no such waiver occurred and therefore the Respondent had to bargain over both the decision and its effects. For the reasons stated below, I believe the Respondent had an *effects*-bargaining obligation, but I respectfully dissent from my colleagues' finding of a decision-bargaining violation.

Background

At the time the Respondent created the DEU program, the Union and the Respondent were parties to a collective-bargaining agreement (CBA) that addressed the Respondent's right to contract with colleges to provide student nurse training services and assign unit nurses to perform those services. Section 2.10 of the CBA, Management Rights, preserved for the Employer the "sole right to manage its business and direct the working force, including the right to decide . . . the nature and extent of services provided" and the right "to assign and delegate work." Section 10.13 of the CBA further confirmed that the Respondent retained the right to provide nurse training services and assign unit nurses to work as "preceptors" in nurse training programs, including training programs for student nurses. Section 10.13 stated that "[a]n employee who is assigned the responsibilities of a preceptor of a graduate nurse, registered nurse or student nurse intern shall be paid a differential of one dollar per hour while working in said assignment."

In the years leading up to the implementation of the DEU program, the Respondent had provided clinical nurse training services by partnering with several colleges. Respondent entered into such arrangements with Jamestown Community College, the University of Pittsburgh-Bradford, and Alfred itself. While these arrangements primarily relied upon the colleges to provide onsite instruction to student nurses, unit nurses occasionally served as preceptors. When they did so, they were paid the contractually required additional $1 per hour. The Union neither bargained with Respondent over these programs nor requested bargaining.

In 2012, Alfred and Respondent again agreed to implement a nurse training program, the DEU program. It is uncontroverted that Respondent complied with all CBA requirements in connection with this program, including paying the $1-per-hour pay differential to unit nurses who were assigned student nurse preceptor responsibilities. However, under the agreement between the Respondent and Alfred, the unit nurse preceptors were also required to become adjunct faculty of Alfred and attend an Alfred orientation session, and Alfred paid each unit nurse preceptor a $1000 stipend.

Analysis

The Board has found a "clear and unmistakable waiver" of the right to bargain where "bargaining partners . . . unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). A waiver of bargaining rights may also be inferred from the parties' past practice or from a combination of the express provisions of the collective-bargaining agreement and the parties' past practice. *American Diamond Tool, Inc.*, 306 NLRB 570, 570

(1992).[1] Some courts of appeals have disagreed with the Board's use of a waiver analysis when the collective-bargaining agreement contains language covering the matter in dispute that reveal the parties have *already* bargained over it. As the D.C. Circuit reasoned in *Department of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992), "[a] waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter; but *where the matter is covered by the collective bargaining agreement, the union has exercised its bargaining right* and the question of waiver is irrelevant" (emphasis in original). See also *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993) (same); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 936–937 (7th Cir. 1992) ("[W]e wonder what the exact force of the 'clear and unmistakable' principle can be when the parties have an express written contract and the issue is what it means. . . ."). This alternative approach is often referred to as a "contract coverage" analysis.

Here, the CBA reflects a mutual agreement, entered into between Olean and the Union, giving Olean the "sole" right to "decide . . . the nature and extent of services provided" and to "assign and delegate work" to bargaining-unit nurses, specifically including the right to assign Olean nurses "the responsibilities of a preceptor of a graduate nurse, registered nurse or student nurse intern," in which case the Olean nurse was to "be paid a differential of one dollar per hour while working in said assignment." This CBA language clearly establishes that Olean had no obligation to engage in *additional* bargaining over a decision to assign Olean nurses to act as preceptors for student nurses enrolled at Alfred or any other educational institution. This is true regardless of whether one applies the Board's traditional "clear and unmistakable waiver" analysis or uses the "contract coverage" standard.[2] Under the clear and unmistakable waiver standard, CBA Sections 2.10 and 10.13 plainly express a "mutual intention . . . to permit unilateral employer action" regarding student nurse training programs and the assignment of training responsibilities to unit nurses. *Provena*, 350 NLRB at 811. This clear and unmistakable waiver is bolstered by past practice: on multiple occasions in recent years, Respondent has implemented such training programs without bargaining and without a request for bargaining from the Union.[3] Likewise, if one applies a contract coverage analysis, the same CBA provisions demonstrate that the Union had "*exercised* its bargaining right" and agreed that Olean has the sole right to provide training for student nurses—in collaboration with Alfred or other educational institutions--and to assign student nurse preceptor responsibilities to unit employees. *Department of Navy v. FLRA*, 962 F.2d at 57 (emphasis added).

Respondent thus acted in accordance with the CBA and past practice when it decided to assign bargaining-unit nurses to act as preceptors for Alfred student nurses under the DEU program and paid the nurse-preceptors the contractually mandated extra $1 per hour.[4] Respondent's assignment of training responsibilities to bargaining-unit nurses was explicitly "covered by the collective bargaining agreement," specifically by the plain language of CBA sections 2.10 and 10.13, which means bargaining had already occurred. Id. The same CBA provisions, combined with the parties' practice, established a clear and unmistakable waiver by the Union of its bargaining rights relative to Olean's decision to assign unit nurses the responsibility to provide training to student nurses enrolled at Alfred.

Although Respondent had the right to make the decision to have its unit nurses provide preceptor services to student nurses from Alfred, this did not give Respondent *carte blanche* to disregard the unique *effects* on unit em-

[1] Additionally, a bargaining waiver may result from a union's failure to request bargaining after receiving notice or learning of a particular change or proposal. See, e.g., *Finch, Pruyn & Co*., 349 NLRB 270 (2007) (finding that union waived its right to bargain by failing to request bargaining over poststrike continuation of subcontracting), enfd. mem. 296 Fed. Appx. 83 (D.C. Cir. 2008) (per curiam); *AT & T Corp*., 337 NLRB 689, 692–693 (2000) (finding that union waived bargaining over closure of employer's Tucson facility, despite initially discussing closure with employer, when it "'dropped the ball' by failing to pursue the matter"). A bargaining waiver may also result, in some cases, from bargaining conduct itself. See *U.S. Lingerie Corp*., 170 NLRB 750, 751–752 (1968) (finding that union waived bargaining over shutdown of New York plant when it insisted on holding employer to results of multiemployer bargaining then underway, where employer had lawfully withdrawn from multiemployer association).

[2] In this case, I find it unnecessary to pass on whether the Board should continue applying the "clear and unmistakable waiver" standard or adopt the "contract coverage" standard embraced by the D.C. Circuit and at least one other court.

[3] The record shows that in recent years, Respondent had contracted for at least three clinical training programs—with Jamestown Community College, the University of Pittsburgh-Bradford, and Alfred—before undertaking the student nurse training program with Alfred that is at issue here. The Union requested bargaining over none of these prior programs.

[4] The majority finds that student nurses in past clinical training programs were supervised by instructors from the partner college. I agree that during past programs, the college generally provided an instructor. However, the record also indicates instances where bargaining-unit nurses served as preceptors and the Respondent paid those unit nurses the contractually mandated $1-per-hour supplement. Furthermore, even if unit nurses had never served in a preceptor capacity until the implementation of the DEU program, the CBA clearly and unmistakably vests in Respondent the "sole" decision to assign unit nurses to act as preceptors to student nurses.

ployees that were associated with the Alfred arrangement. Separate from Olean's compliance with the CBA requirement to pay unit nurse preceptors a $1-per-hour wage differential, the DEU agreement between Olean and Alfred contemplated that the preceptor nurses would become adjunct faculty of Alfred and attend an Alfred orientation session, with Alfred paying the unit nurse preceptors a $1000 stipend.

For several reasons, I believe these aspects of the Olean-Alfred arrangement are appropriately regarded as "effects" of the DEU agreement. First, the central feature of the Olean-Alfred arrangement was obviously Olean's assignment of preceptor responsibilities to its unit nurses, which was explicitly covered by CBA sections 2.10 and 10.13. Second, the ancillary aspects of the arrangement—the adjunct faculty affiliation, the orientation session, and the $1000 stipend—pertained only to Alfred (which was not signatory to the CBA) and not Olean. Third, none of these details followed inescapably from the CBA provisions granting Olean the unilateral right to assign unit nurses to act as preceptors. Nonetheless, these ancillary aspects affected Olean nurses assigned preceptor responsibilities under the DEU program. Moreover, the Union —though it had no bargaining relationship with Alfred—had an obvious interest in meaningful discussions with *Olean* regarding these matters (including, for example, what would be associated with "adjunct faculty" status, how or when the $1000 stipend would be paid, and which unit nurses would be selected to serve as preceptors in the DEU program).[5] Accordingly, I believe the record warrants a finding that Respondent was obligated to provide a reasonable opportunity for effects bargaining regarding these aspects of the Olean-Alfred arrangement prior to the DEU program's implementation.

The Board has similarly required effects bargaining when employers engage in third-party transactions, even though decision bargaining is not required over the transaction itself. In *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990), the Board found that the employer unlawfully failed to bargain over the effects of a sale, even though the sale itself was not a mandatory subject of bargaining. Although *Willamette* dealt with a third-party sale rather than a third-party agreement regarding training, the relevant bargaining principles are similar: the employer was *not* required to bargain regarding the third party agreement, but Section 8(a)(5) required it to afford the union the opportunity for effects bargaining and to do so *prior to implementation*. The Board reasoned as follows:

> The sale of a business does not depend just on the seller's desire to sell. The sale of a business to a purchaser necessarily requires the purchaser's assent to the terms of the sale before the sale actually takes place. Even after the purchaser and seller agree on the terms, significant contingencies may remain. . . . Until these contingencies are satisfied, the seller may not be able to say with any degree of assurance that the sale will go through.
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> . . .
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> If a seller and a purchaser can be expected to negotiate about, and draft their agreement to provide for satisfaction of, various contingencies such as governmental clearances, so, too, should they be able to account for the human factor—the employees' interest in having their designated representative notified and given an adequate opportunity to bargain about the *effects* of the sale. That circumstances may compel confidentiality in arriving at a sales agreement does not obviate the employer's duty to give *pre-implementation notice to the union to allow time for effects bargaining*, provision for which may be negotiated in the sales agreement. We do not presume here to advise corporate negotiators how to accommodate the right of a union to negotiate the effect of the sale on the employees it represents. We merely decide that, barring particularly unusual or emergency circumstances, the union's right to discuss with the employer how the impact of the sale on the employees can be ameliorated *must be reckoned with . . . sufficiently before its actual implementation* so that the union is not confronted at the bargaining table with a sale that is a fait accompli.

Id. at 282 (emphasis added).

This logic applies equally here. Like the employer in *Willamette*, the Respondent was entitled to act unilaterally regarding the *decision* to assign unit employees to provide training to Alfred student nurses.[6] Therefore,

[5] Indeed, the Union's information requests regarding the DEU program—seeking information regarding potential joint employment of unit nurse preceptors by Respondent and Alfred, the training provided to unit nurse preceptors, the compensation paid by Alfred, and the selection criteria for unit nurse preceptors—indicate that it was the *effects* of the decision, rather than the decision itself, over which the Union sought bargaining. Because I find that Respondent was obligated to bargain over the effects of its arrangement with Alfred, I agree with my colleagues that Respondent violated Sec. 8(a)(5) by failing to give the Union the information it requested concerning the DEU program.

[6] Respondent's decision to enter into the DEU program without bargaining was permissible based on CBA provisions vesting in Respondent the "sole" right to make such a decision. However, I agree with my colleagues' rejection of Respondent's argument, in reliance on *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 223 (1964), that it had no duty to bargain because this was a managerial decision "at the core

Respondent did not violate the Act by entering into the arrangement with Alfred to provide training pursuant to the DEU program. However, regarding the DEU program's unique characteristics, Respondent had to provide "pre-implementation notice to the union to allow time for effects bargaining" so relevant details could be "reckoned with . . . sufficiently before . . . actual implementation." Id.[7]

I believe the majority incorrectly finds that the parties' CBA was insufficient to waive the Union's right to bargain over Respondent's decision to enter into the student nurse training arrangement with Alfred. In my view, the majority's reasoning suffers from several flaws.

First, although my colleagues emphasize that the CBA language does not specifically refer to the details of the DEU program, the finding of a waiver does not require use of particular words or phrases when the meaning of the contract is clear. See *Chemical Solvents, Inc*., 362 NLRB No. 164, slip op. at 5–6 (2015) (finding clear and unmistakable waiver of the right to bargain regarding subcontracting where contractual language did not mention subcontracting but allowed employer to transfer work to any other entity). In the present case, sections 2.10 and 10.13 of the CBA clearly indicate that the Respondent retained the right, without limitation, to "decide . . . the nature and extent of services provided"—including the service of providing training for student nurses—and to assign unit nurses to work as preceptors in nurse training programs. The fact that the CBA did not reference particular programs, such as the DEU program, or the particulars of each program in which nurses would perform this preceptor function is of no moment. The contractual language also did not provide the contractual details of Respondent's prior training agreement with Alfred or its prior agreements with Jamestown Community College and University of Pittsburgh-Bradford. Yet the Union raised no objection to these programs, further bolstering the case for waiver by its acceptance of the Respondent's practice.

Second, my colleagues argue that the DEU program was "sufficiently distinguishable" from past clinical training programs to require bargaining. I agree there were differences between the DEU program and previous student nurse training programs: Alfred's requirement that preceptors become adjunct faculty, the Alfred-conducted orientation session, and the $1000 stipend to be provided by Alfred. However, these ancillary effects are distinct from the assignment of preceptor responsibilities to unit nurses, which is explicitly permitted under the CBA. These differences also relate exclusively to actions by Alfred, a third party with which the Union has no bargaining relationship. Moreover, as explained above, I agree that Respondent was required, before implementing the DEU program, to provide the Union notice and the opportunity for bargaining regarding these ancillary effects. *Willamette*, supra.

In short, I believe Respondent's CBA and its past practice permitted it to unilaterally enter into the DEU program with Alfred to provide training services for student nurses. In my view, the Respondent acted lawfully when it did so regardless of whether we apply the Board's traditional "clear and unmistakable waiver" standard or the "contract coverage" analysis that has been embraced by some courts. I dissent from my colleagues' finding that Respondent violated Section 8(a)(5) by making the unilateral decision, without bargaining, to enter into the DEU program. However, I concur with my colleagues' finding that Respondent violated Section 8(a)(5) by fail-

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of entrepreneurial control." The Board and the courts have held that many decisions involving major business changes may be nonmandatory subjects of bargaining depending on the particular facts presented. See, e.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), enfd. sub nom. *Food & Commercial Workers Local. 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993). Here, however, if one were to disregard the Respondent's CBA and its past practice of entering into similar arrangements involving the assignment of student nurse training responsibilities to unit employees, I agree that the assignments at issue here would be a mandatory subject of bargaining. See, e.g., *WCCO-TV*, 362 NLRB No. 101, slip op. at 2 (2015) ("It is well established that the assignment of work is a mandatory subject of bargaining."); *Antelope Valley Press*, 311 NLRB 459, 460 (1993) (same).

[7] I agree with the D.C. Circuit's observation that, when a collective-bargaining agreement "grant[s] an employer the unilateral right to make a particular decision," it would be "rather unusual" to find that the parties intended to reserve to the union the "right to bargain over the effects of that decision" unless "some language or bargaining history . . . support[s] the proposition that the parties intended to treat the issues separately." *Enloe Medical Center v. NLRB*, 433 F.3d 834, 839 (D.C. Cir. 2005). In *Enloe*, the parties' collective-bargaining agreement authorized the employer to implement a new mandatory on-call policy for its bargaining unit nurses, and the D.C. Circuit rejected the Board's conclusion that the employer nonetheless violated Sec. 8(a)(5) by failing to bargain over the "effects" of that policy. Unlike this case, *Enloe* involved a decision to implement a policy that had obvious effects inseparable from the decision itself. Thus, the court concluded that differentiating between the policy's implementation and its effects was an "artificial contractual interpretation," reinforced by the fact that the union itself never identified "any particular discrete effect" about which it desired bargaining. Id. In the instant case, by comparison, the Olean-Alfred DEU program clearly had potential effects—the potential "adjunct" affiliation of unit employees with Alfred, attendance at an Alfred orientation program, and a $1000 stipend—that did not follow directly from the assignment of preceptor responsibilities to unit employees, that varied from similar past assignments, and about which the Union specifically requested information. See fn. **Error! Bookmark not defined.**25, supra. Cf. *Fresno Bee*, 339 NLRB 1214, 1214–1215 (2003) (when a particular decision may be implemented unilaterally, effects bargaining over resulting changes is required unless those changes "resulted directly" from the decision and "there was no possibility of an alternative change").

ing to provide the opportunity for effects bargaining prior to the DEU program's implementation. I also agree that Respondent violated Section 8(a)(5) by failing to furnish the Union the information it requested concerning those effects.[8]

Accordingly, in the ways and for the reasons stated above, I concur in part and dissent in part.

Dated, Washington, D.C. December 11, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment without first notifying the New York State Nurses Association (the Union) and giving it an opportunity to bargain over the decision and its effects.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT**,** in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request by the Union, rescind the changes in the terms and conditions of employment for our unit employees that we unilaterally implemented beginning about November 2012, including the DEU program.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All full-time, regular part-time, and per diem staff and temporary Registered Nurses and Graduate Nurses employed by the Olean General Hospital, including Utilization Review Coordinators, Infection Control Nurses, Cardiac Care and Cardiac Rehabilitation Nurses, QA Nurses, RN Educators, RN Instructors, Employee Health Nurses, and Charge Nurses; excluding Discharge Planners, Clinical Care Coordinators, Nurse Managers, Assistant Nurse Mangers, Shift Managers, Licensed Practical Nurses, Nursing Assistants, any other professional employees, technical employees, service and maintenance employees, clerical employees, guards and supervisors as defined in the Act.

WE WILL**,** upon request, bargain with the Union over the implementation and effects of the implementation of the DEU training program.

WE WILL furnish to the Union in a timely manner the information requested by the Union on January 2, 2013, about the DEU training program.

WE WILL furnish to the Union in a timely manner the survey and list of deficiencies requested by the Union on March 4 and April 1, 2013, which was issued by the Joint Commission on Accreditation of Healthcare Organizations, except for any patient identifying information, which will be redacted; however, we will furnish to the Union any redacted information if the Union demonstrates in the future a particularized need for the redacted information. Upon receipt of the information, the Union, its officers, agents, members, and attorneys, shall not divulge the information to any other persons who are not involved in or necessary to the Union's representational functions.

[8] I further agree, for the reasons my colleagues state, that Respondent violated Sec. 8(a)(5) by failing to furnish the Union with the March 2013 JCAHO report containing a list of patient-care deficiencies, and I agree that any patient identifiers must be redacted from the report before it is furnished to the Union. In addition, I would permit Respondent, in a compliance proceeding, to identify any other matter (in addition to patient identifiers) that it contends is confidential and, before requiring disclosure of such matter, would direct the parties to bargain an accommodation between Respondent's confidentiality interest and the Union's need for the information.

Because I believe Respondent was permitted to enter into the DEU program without bargaining, I dissent from my colleagues' imposition of a remedy requiring Respondent, on request, to rescind the DEU program. When an employer commits an effects-bargaining violation, the Board's standard remedy is an order requiring it to engage in effects bargaining, augmented by a limited backpay remedy (often called a "Transmarine" remedy) commencing five days after the Board's order and ending with the occurrence of one of four specified conditions, including an agreement or impasse. See *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

OLEAN GENERAL HOSPITAL

The Board's decision can be found at www.nlrb.gov/case/03–CA–097918 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Linda M. Leslie, Esq., for the General Counsel.
James N. Schmit, Esq. (Jaeckle Fleischmann & Mugel LLP), of Buffalo, New York, for the Respondent.
Claire K. Tuck, Esq. (Legal Department, New York State Nurses Association), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Buffalo, New York, on August 13, 2013. The New York State Nurses Association (the Union) filed the charges in the case on February 7, May 6 and 7, 2013. The General Counsel issued a consolidated complaint in these matters on July 5, 2013.

The General Counsel alleges that Respondent, Olean General Hospital, violated Section 8(a)(5) and (1) by unilaterally implementing a program in which bargaining unit nurses acted as clinical teachers for nursing students from Alfred State University. The primary issue with regard to this program, the Dedicated Education Unit (DEU), is whether it was sufficiently different than similar programs with other nursing schools, to require notice and an opportunity to bargain with the Union.

The General Counsel also alleges that Respondent violated Section 8(a)(5) and (1) by failing and/or refusing to provide the Union with specific information about the DEU program, to wit: from whom the bargaining unit nurses participating in the program would receive their orders, the type of training that was to be provided to these nurses and the curriculum and weekly expectations for the nursing students.

Unrelated to the DEU program, the General Counsel alleges that Respondent also violated the Act in failing to provide the Union, as it requested, the results of a survey conducted at the hospital on or about March 1, 2013, by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) and the deficiencies noted in that survey.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and Charging Party Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent operates a hospital in Olean, New York, where it annually derives gross revenues in excess of $250,000 and purchases and receives goods valued in excess of $50,000 from points outside of New York State. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The DEU Program and Related Information Requests

The New York State Nurses Association has represented the registered nurses at Respondent's hospital since 1996. There currently are about 220 nurses in the bargaining unit. The Respondent and the Union were parties to a collective-bargaining agreement whose term ran from February 1, 2010, to January 31, 2013. Negotiations for a successor contract began in November 2012. As of the August 2013 hearing in this matter, these negotiations were still ongoing. The term of the 2010–2013 contract was extended to May 1, 2013, and then expired.

In November 2012, Respondent informed Karen Wida, a union representative, that it was creating a new program, the Dedicated Education Unit (DEU), with Alfred State University. On December 2, 2012, a bargaining unit nurse informed Wida that the nurse had been selected to be a clinical instructor for this program. On December 4, 2012, Wida sent an email to Jeffrey Zewe, Respondent's vice president for patient care services and chief nursing officer, and to Timothy McNamara, senior vice president of human resources. Wida indicated that Respondent was illegally dealing directly with bargaining unit members and requested negotiations with Respondent about the Alfred State/DEU program.

Timothy McNamara responded to Wida asserting that the DEU program was consistent with the parties' collective-bargaining agreement. Wida disagreed, opining that the DEU program went beyond the terms of the collective-bargaining agreement. She indicated that the DEU program was inconsistent with the contract and established past practice in that it made the participating unit nurses adjunct members of the Alfred University staff and called for payment to the nurses from Alfred State. Wida also mentioned other matters not at issue in this case.

On January 2, 2013, Wida sent Respondent an email with an attached list of concerns and questions regarding the DEU program. The email stated, "please see the attached concerns and questions related to the preceptor/internship program and respond to me at your earliest convenience." Items 2 and 7 in the attached list are at issue in this case. They are as follows:

> 2. The problem becomes if the nurse is working for both employers at the same time, who do they take their orders from,

the hospital or the college? This puts the nurse in a lose/lose situation. They have to protect their license.

7. What type of education is being provided to the selected nurses to provide the education/clinical experience the college is looking for as well as the curriculum and weekly expectations of the students?

Respondent never responded to this union request in writing. Although Respondent promised to provide the information orally, it has not done so. However, Chief Nursing Officer Jeffrey Zewe orally explained the basics of the DEU program to Wida.

A bargaining unit nurse provided Wida with a copy of a November 2012 letter from Alfred State University to the unit nurses who might be selected to be clinical trainers in the DEU program. This letter explains that a nurse selected for the program will be a representative of Alfred and the DEU program, as well as an employee of Respondent. Interested nurses were instructed to fill out an application. They were also informed that selections would be made pursuant to interviews with officials from the college and the hospital and that those selected would be required to attend a mandatory orientation program given by Alfred State faculty members.

The DEU program started in January 2013, and ran through May. Respondent selected seven bargaining unit nurses to serve as trainers for the Alfred students. They were supposed to be with their students for 36 hours every 2-week pay period. These nurses received $1000 from Alfred State in addition to their wages from the hospital.

Respondent has had agreements with other educational institutions that allowed nursing students to gain practical experience in the hospital. These agreements were not negotiated with the Union. These agreements differed from the DEU program in that the nurses who oversaw student nurses at the hospital were not required to sign an agreement with the educational institution, were not paid by the school, and were not required to attend training given by the school. Also, unlike other training programs for student nurses, no clinical instructor from Alfred State was present during the onsite training of the student nurses.

Section 10.13 of the parties' 2010–2013 collective-bargaining agreement provides:

An employee who is assigned the responsibilities of preceptor of a graduate nurse, registered nurse, or student nurse intern shall be paid a differential of one dollar ($1) per hour while working in said assignment. To be assigned preceptor, an employee must successfully complete the in-service program for preceptors.

The Joint Commission Survey

On March 1, 2013, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) performed an unannounced survey at Respondent's hospital. The JCAHO is a private regulatory body that inspects hospitals to determine the quality of patient care and the adequacy of safety measures. Although participation in a JCAHO survey is voluntary, there is a substantial incentive to participate. JCAHO surveys a hospital approximately every 3 years. If a hospital does not participate in a JCAHO survey they will be surveyed annually by the Centers for Medicare and Medicaid.

The JCAHO informed the hospital of its preliminary findings immediately following completion of the survey. In late March, JCAHO sent the hospital its final report. JCAHO found 40–43 deficiencies involving patient care. On March 4, after learning about the March 1 survey from bargaining unit nurses, Union Representative Dennis Zgoda sent Respondent a letter requesting a copy of the report and a list of all deficiencies noted in the survey.

On March 6, Timothy Finan, president and CEO of Olean General Hospital, sent a memo to the departments of surgery, anesthesiology, and the surgical nursing staff. Finan discussed deficiencies noted by the JCAHO. These deficiencies were failure to appropriately identify patients prior to procedures, failure to assess patients prior to moderate sedation, and failure to update certain documentation prior to a procedure. Finan informed his staff that there would be zero tolerance for failure to take corrective action.

On March 8, Vice President Timothy McNamara responded to the request by informing Zgoda that his request had been referred to the hospital's attorneys. Respondent provided no further response to the Union's request for the JCAHO survey and list of deficiencies.

Analysis

The DEU Program is Sufficiently Distinguishable from Other Student Nursing Programs to Require Notice and an Opportunity to Bargain

It is true that the Union and Respondent had not negotiated previous arrangements between the hospitals and nursing schools. However, the DEU program with Alfred State is sufficiently different from those other arrangements that Respondent was obligated to provide the Union with prior notice and an opportunity to bargain over the implementation of the DEU program.

As the Union contends, no prior program for student nurses involved having unit nurses sign an agreement with the educational institution. No prior program required the unit nurse to be trained by the school or provided for payment to the nurses by the school. Other training programs included oversight by an onsite instructor from the institution.

Respondent's argument that the DEU program is covered by Section 10.13 of the contract is belied by the fact that the contract does not provide for a $1000 payment to the nurse from any educational institution. This is essentially the granting of a unilateral wage increase to a small number of bargaining unit members.

The JCAHO Survey is not Protected from Disclosure by State Statute and its Contents are Potentially Relevant to the Union's Responsibilities as Exclusive Bargaining Representative of Respondent's Nurses

Respondent argues that it need not produce the JCAHO survey because it is not relevant to the Union's responsibilities. However, the record reflects that staffing has been a major issue in contract negotiations. The deficiencies noted in the JCAHO may at least arguably be related to staffing issues.

Respondent's witness, Diane Haughney, conceded that the number of RNs working on any given unit can impact the patient care provided. (Tr. 75–76.) Thus, the record establishes the potential relevance of the report. Potential relevance is all that must be shown to entitle the Union to this survey, *Detroit Newspaper Agency,* 317 NLRB 1071 (1995). Therefore, I conclude that the Union is entitled to the JCAHO report and a list of the deficiencies found in the survey unless that Respondent is justified in refusing to produce the survey on confidentiality grounds.

Confidentiality of the JCAHO Survey

The general rules regarding employer claims of confidentiality are set forth in *Detroit Newspaper Agency,* supra. Substantial claims of confidentiality may justify refusals to furnish otherwise relevant information. Confidential information is limited to a few general categories: that which would reveal, contrary to promises or reasonable expectations, highly personal information, such as individual medical records; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that is which is traditionally privileged, such as memoranda prepared for pending lawsuits, id., at p. 1073. The JCAHO survey fits into none of these categories.

Respondent's claim of confidentiality rests solely on the contention that disclosure is precluded by Section 6527(3) of the New York Education Law, citing *Borgess Medical Center,* 342 NLRB 1105 (2004).[1] However, this statute does not, on its face, prohibit disclosure of the JCAHO survey to the Union and Respondent provides no other grounds for claiming confidentiality.

Section 6257(3) in pertinent part states that "Neither the proceedings nor the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program nor any report required by the department of health . . . shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided or as provided by any other provision of law."

The Union is not seeking disclosure of the survey results under article 31 of the New York civil practice law. It seeks production of the survey under the NLRA. Thus Section 6257(3) is completely irrelevant to this case. Moreover, assuming this section is relevant, it expressly exempts disclosure under other provisions of law, such as the Section 8(a)(5) of the NLRA. Respondent is thus in violation of the Act, as alleged, in withholding the report.

CONCLUSIONS OF LAW

1. By failing to timely notify the Union and afford it an opportunity to bargain about the decision to implement the DEU program, Respondent violated Section 8(a)(5) and (1) because that program differed materially from prior programs and what is contemplated by the parties' collective-bargaining agreement. These material differences are the requirement that nurse/preceptors sign an agreement with Alfred State University, that nurses/preceptors would be paid $1000 by Alfred State, that nurse/preceptors would be required to be trained by Alfred State and that nurse/preceptors would train student nurses without the presence of an onsite instructor from Alfred State.

2. Respondent also violated Section 8(a)(5) and (1) by failing and refusing to bargain in good faith with the Union by not furnishing the Union with relevant information it had requested concerning the JCAHO survey and the DEU program.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Olean General Hospital, Olean, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to timely notify the Union and afford it an opportunity to bargain over the implementation and effects of the implementation of the DEU program.

(b) Failing and refusing to bargain in good faith with the Union by refusing to furnish the Union with relevant information it had requested.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) If requested by the Union, rescind the DEU program.

(b) Provide the Union with notice and an opportunity to bargain over the decision to implement and the effects of the implementation of the DEU program.

(c) Furnish the Union the information it requested in its January 2, 2013 email, set forth in paragraphs 2 and 7 of its attachment to that email, and the JCAHO survey and list of deficiencies noted by JCAHO.

(d) Within 14 days after service by the Region, post at its Olean, New York hospital copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as

[1] Respondent did not raise this defense until it filed its answer to the consolidated complaint on July 19, 2013. Prior to that, it simply ignored the Union's request for the survey. Generally, if an employer had a legitimate confidentiality concern, it must notify the union promptly and explore the possibility of an accommodation of its confidentiality concerns and the union's need for the information.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2, 2013.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 24, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with the New York State Nurses Association as the exclusive bargaining representative of all our full-time, regular part-time, and per diem staff and temporary registered nurses and graduate nurses, by making changes in your terms and conditions of employment without first giving the Union notice and an opportunity to bargain about such changes and the effects of those changes, including the unilateral implementation of the DEU program for bargaining unit employees.

WE WILL NOT fail or refuse to provide the Union with information that it has requested that is relevant to its role as your bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, if requested by the Union, rescind the unilateral implementation of the DEU program and WE WILL provide the Union notice and an opportunity to bargain about the DEU program, including its effects.

WE WILL provide the Union with the information it requested about the DEU program on January 2, 2013 in paragraphs 2 and 7 of the attachment to its email request and the written reports by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) of its 2013 survey and any list of deficiencies found by the JCAHO.

OLEAN GENERAL HOSPITAL